

Top procurators... never-ending show

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«Looking to the past of the newly-appointed Attorney general M. Potebenko, one may be anxious about his possible political orientation towards a direction different to the one that would be preferred by democratic and pro-reform forces of the society. Allegedly, Mr. Potebenko underwent some transformations between the periods of occupying the position of Prosecutor of the U[krainian] SSR and the Attorney General of Ukraine. Well, we'll live on and see...»

Vyacheslav Chornovil, Kievskie Vedomosti, July 25, 1998

If Attorney General of Ukraine Mykhailo Potebenko had submitted his resignation last week, the event could have become a key point and a logical development of the recent political tension in Ukraine. However, no resignation occurred. On February 22, 2001, only 111 out of 449 members of the Ukrainian parliament supported the draft resolution on a no-confidence vote to Potebenko, proposed by Hennady Udovenko (Rukh-1), Yuri Kostenko (Rukh-2) and Victor Pynzenyk (Reforms and Order).

None of the five draft versions, initially proposed to the parliament and designed to evaluate the performance of the Office of Attorney General as unsatisfactory (which would have automatically caused the dismissal of the Attorney General) was supported by the necessary 226 votes. Only five parliamentary groups, including the factions of Yulia Tymoshenko's Batkivshchyna, both Rukhs, the Reforms-Congress, the Socialists and non-faction MPs of the Sobor party, insisted on the no-confidence vote. While the hopes for dismissing Potebenko rested with convincing the Communists to support the proposed resolution, as their 112 votes could be critical in securing the adoption of the resolution, the Communists refused to participate in the voting at all. As their leader Petro Symonenko put it, Communists had done so because they believed the whole matter was nothing but «settling scores between the clans» (Uriadovyi Kurrier, February 23, 2001). The parliament's other major parties and groups that claim to be «centrist» – the SDPU(o), the Vidrozhennya Rehioniv, the Trudova Ukraina, the PDP, as well as the Greens and the Yabluko and the leadership of the Verkhovna Rada – also refused to vote with rare individual exceptions who supported the proposed draft resolution.

Paradoxically, the political decision not to take part in the voting was not motivated by satisfaction with the performance of the Office of Attorney General. Almost all of the factions and groups have been rather critical about the agency's performance, regardless of their choice not to force the Attorney General to resign. As Ukraine's first president Leonid Kravchuk, MP, put it, «I personally will not vote for the dismissal of the Attorney General not because I think so highly about the Procurature General. I think today we need to find common actions and start a dialogue in the society» (UTN, UTN-Panorama, February 22, 2001).

Remarkably, Communists share similar logic, though pretending they have «their way». As Petro Symonenko put it, «we are not going to play that game, we told the people openly [that] we are against Potebenko, we do not support [him]» (UTAR, Express-Inform, February 22, 2001). However, he seems to be more concerned about prospects for future activities of the Procurature General should Potebenko be forced to resign: «in this case the game is played for who is going to own the Procurature General today in this system of power,» Symonenko went on.

Similar positions are shared by other factions that refused to vote for the draft resolution. Leader of the Solidarity, Petro Poroshenko, gave almost identical argument for his withdrawal from the process: «... If someone puts the issue straightly about changing the Attorney General, whom does he propose as a replacement to Mykhailo Oleksiyovych [Potebenko]? Without such a proposal today we have no reason to risk the fate of Ukraine and have an acting Attorney General for one more year who, in fact, will be limited in his powers to protect the state of legality in Ukraine» (UTAR, Express-Inform, February 22, 2001).

The demonstrative understanding between the Communist faction and factions of the «parliamentary

majority» serves as yet another evidence of critical changes in the configuration of the majority, and shows it as a predominantly situational alliance. The variety of attitudes of MPs to the Attorney General and his role in preventing «risking the fate of Ukraine» and ensuring «protection of legality» reflects the controversial role of the Office of Attorney General and its leadership in the Gongadze case.

The position of the Attorney General in Ukraine has always been among the top one in the state hierarchy. The Procurature has been de facto a political player, reflecting the real status of division of powers in Ukraine's emergent democracy. As late Vyacheslav Chornovil argued in 1998, «... ex-prosecutor general Vorsinov, who maintained he was a political figure, really worked for certain political forces, was politically biased, and his successors in that position also coordinated their actions with the rulers» (Kievskie Vedomosti, July 25, 1998).

Mykhailo Potebenko was the last prosecutor of the Soviet Ukraine. In September 1991 he was succeeded at that position by Victor Shyshkin, who was replaced by Vladislav Datsiuk in October 1993. Later on, Mykhailo Potebenko publicly admitted that Datsiuk «personally rudely violated citizens' constitutional rights, signing blank forms for sanctioning arrests, turning a blind eye to making criminal lawsuits against innocent people...» (Silski Visti, July 21, 1998). Datsiuk was replaced by another hideous individual, Hryhory Vorsinov. Interestingly, commenting on independence (or rather, the lack of it) of the Office of Attorney General in Ukraine from politics and politicians, Mykhailo Potebenko made a noteworthy remark: «I would only say [that] if it were not for Hryhory Vorsinov who had been Attorney General for two years and covered everything, if it were not for Pavlo Lazarenko who was Prime Minister, this criminal case would have been completed in 1997 the latest. And the court would have issued its judgement in the Agafonov case» (Ukraina Moloda, October 10, 1998). No comment needed.

Hryhory Vorsinov's successor in the office – this time as acting attorney general – was Oleg Lytvak. For a year, from July 1997 to July 1998, the parliament repeatedly refused to vote in favor of approving Lytvak in that position. The second arrival of Potebenko to the Procurature General occurred in July 1998, when the country was preparing for the October 1999 presidential election race. When President Kuchma nominated Potebenko as his candidate to lead the Procurature General, the parliament, tired with almost three months of bargaining that accompanied the election of the Speaker, gave in. The idea to appoint Potebenko was approved by almost all factions. Representative of Oleksandr Moroz's Left Center Stanislav Nikolayenko announced that his faction «in general» intended to support the candidate. Leader of the Greens faction Vitaly Kononov was also positive about the nominee, stating that although his faction had not made its final decision, most of its members were «inclined to treat [Potebenko] favorably». The SDPU(o) faction, according to its leader of the time Yevhen Marchuk, also agreed to support Potebenko, arguing that «his answers during the meeting with the faction satisfied almost everyone». According to representative of the Communist faction Georgy Kriuchkov, the faction was prepared to support the candidate as «the least hideous» (Ukraina Moloda, July 16, 1998).

Those who opposed the appointment of Potebenko included representatives of the People's Democratic Party (PDP), particularly the faction leader of the time Volodymyr Filenko (who left both the faction and the party in 1999): «...[Potebenko's] attitude in the period of the emergence of the state and after the [August 1999] coup d'état was anti-Ukrainian and antidemocratic» (Ukraina Moloda, July 16, 1998). According to Filenko, the appointment of Potebenko to the position of Attorney General on the 7th anniversary of the Declaration of Ukraine's State Sovereignty was «a spit at the democratic forces that fought for Ukraine's independence» (Kievskie Vedomosti, July 17, 1998). The Rukh members were also strongly opposed to the appointment of Potebenko. However, 226 MPs chose not to engage in yet another voting marathon and voted Potebenko in at the first try.

Mykhailo Potebenko graduated from the Law Department of the Lviv University in 1960 and started his career as an investigator of the Novotroitsky and Genichensk district Procurature of the Kherson region. Subsequently, he was promoted to the positions of head of the Kherson regional Procurature, then Deputy Prosecutor and First Deputy Prosecutor of Ukraine. His Soviet-time career was completed at the position of the Prosecutor of the Ukrainian SSR. He was seen as a rather controversial figure: on the one hand, he was the one who assisted the rehabilitation of Ukrainian poet and independence icon Vasyl Stus; on the other hand, in 1991 Potebenko was directly involved in the trial against Stepan Khmara, leader of the Ukrainian Republican Conservative party and MP. Then, commenting on the

appointment of Potebenko, the Ukrainian media ironically wrote that «the priceless Soviet cadres like the «double general prosecutor» of Ukraine Mykhailo Potebenko do not leave the domestic «arena» and keep their high price» (Zerkalo Nedeli, July 18, 1998).

Meanwhile, Potebenko's arrival to the leadership of the Office of Attorney General was seen as giving some hope for reforming the Procurature, improving the norms and methods of prosecution. Potebenko claimed he would «liquidate the vicious practice of planting staffers to the regions and protectionism in the Procurature General» (Vechirniy Kyiv, July 23, 1998).

Shortly after his new appointment, Potebenko argued: «I have already had this power and I know what to do with it <...> I do not think I am a politician. I agree with the President: the Procurature must be beyond politics. As Attorney General, I have no right to belong to a specific political stream» (Den, July 25, 1998). However, in reality that was not the case. In one of his early official statements Potebenko claimed that «the Attorney general of Ukraine will not allow any pressure on the Office of Attorney general of the state» nor any «devious, deceitful criticism addressed to the President of Ukraine» (UNIAN, August 6, 1998). Well, this statement had its hard-to-challenge sense...

Back to the current events, note that the failed no-confidence voting on February 22 followed a series of events directly linked to Potebenko's involvement in the current political crisis and his refusal to report to the parliament. On February 14 Speaker Ivan Pliushch announced that «according to the decision of the Verkhovna Rada the attorney general had the right and the duty to report» (Silski Vesti, February 23, 2001). However, the date of the report was not set then, and Potebenko safely left for a vacation, referring to the need to take care of his poor health. On February 19 Ivan Pliushch announced that he had «personal negotiations» with Potebenko the week before. «He agreed to provide information on the Gongadze case but is not planning to report,» Pliushch said (Ukraina Moloda, February 20, 2001).

Notwithstanding the announcement that Potebenko was not going to show up in the parliament and speak to the MPs, the coordination council of the parliamentary factions resolved to demand on the Attorney General to present his report on February 21. However, nothing happened, as Potebenko simply did not come to the parliament. The day before he announced that «according to the provisions of the Constitution, I, as Attorney General, cannot allow any deviations from them: there will be no report of the Attorney General to the Verkhovna Rada tomorrow» (Ukraina Moloda, February 20, 2001). The case represents yet another legal collision. According to head of the parliamentary Committee for Fighting Organized Crime and Corruption Yuri Karmazin, «the claim that the Attorney General is in no way accountable to the people represented by the Verkhovna Rada is absolutely absurd, for even the head of the government is accountable to the parliament» (Ukraina Moloda, February 21, 2001). However, it looks like the Office of Attorney General managed to become «more equal» than other state agencies.

Before the end of 1991 the Ukrainian Procurature was part of the Soviet prosecution machine. Since the Soviet times it has undergone obvious qualitative and quantitative changes. While in 1986 the apparatus of the Ukrainian Procurature had included two departments and 16 divisions, by 1993 it had grown into the Office of Attorney General of Ukraine and expanded to seven departments and 26 divisions. The number of staff increased by 2.2 times, and continued to grow rapidly. By early 1998 the Office of Attorney General of Ukraine and expanded to 16 departments and 30 divisions, employing over 700 operative officers (compared to 200 in 1986). Noteworthy, the central apparatus of the Procurature General of the Soviet Union consisted of only 7 departments and 9 divisions (Holos Ukrainy, September 17, 1998).

As stipulated in Article 121 of the Constitution, the Ukrainian Procurature deals with maintaining indictment in court on behalf of the state, representing interests of individuals or the state at court, ensuring oversight of the observance of the law by governmental agencies involved in operative information gathering, investigation, interrogation and pre-trial detention. It also oversees the observance of laws in the course of enforcement of court's judgements on criminal charges, as well as in other law-enforcement measures and measures taken to limit personal freedoms.

The specific question as to whether the Attorney General would report to the parliament on February 21 gradually evolved to the general issue of whether the Office of Attorney General is accountable to the parliament at all. The situation was rather typical for Ukraine, with the Constitution and laws being

interpreted in accordance with positions and corporate interests of particular state agencies. Political motivations, again, proved to be stronger than the contradictory Ukrainian legislation.

According to the Constitution of the Soviet Ukraine, the parliament appointed the Attorney General, who was accountable to the parliament (also called the Verkhovna Rada). The 1996 Constitution of Ukraine made substantial changes to the order of appointment of officials to that position. Under the current Constitution, the Verkhovna Rada only has the right to approve the appointment of the Attorney General by the President. The Constitution defines functions and the scope of authority of the Procurature, and stipulates that the Attorney General, «appointed to that position with the approval of the Verkhovna Rada and dismissed from the position by the President. The Verkhovna Rada may deny confidence to the Attorney General of Ukraine, which shall result in his resignation from the position. The term in office of the Attorney General of Ukraine is five years» (Article 122). The Constitution does not say anything about reporting and accountability. However, following the Constitution, the Verkhovna Rada may issue the vote of no confidence to the Attorney General literary at any point, even in his absence.

Article 123 of the Constitution stipulates that «organization and provisions for activity of the prosecution bodies of Ukraine shall be determined by the law.» However, as far as the Office of Attorney General is concerned, the relevant law is the one «On Office of Attorney General of Ukraine», approved on November 5, 1991 and last amended on November 26, 1993, i.e., well before the adoption of the 1996 Constitution. The law is obviously outdated, and that fact was officially admitted by the Constitutional Court of Ukraine. However, so far the parliament has failed to adopt a new law that would define new «rules of the game» for the prosecution. The lack of the new set of rules, among other things, has been a major impediment to systematic reform of the law-enforcement agency. The general reform of the prosecution system, started in 1993-1994, has never been logically completed. The measures taken were predominantly ill-considered and reflected redistribution of power within the bureaucratic structure and political preferences of its leadership. The situation was accurately described by member of the 2nd parliament of Ukraine (1994-1998), an honorary lawyer of Ukraine Hennady Vasyliiev: «a major drawback of the reforms was the fact that they were not based on a fundamental principle, characteristic of activity of an oversight body: the strengthening of its role in enforcement of human rights in the state and the society» (Holos Ukrainy, September 17, 1998). Nowadays the problem is as much an issue as before.